



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Dunbar & Sullivan Dredging Co.

File: B-232416

Date: September 29, 1988

DIGEST

Contracting officer's determination that surety is non-responsible has a reasonable basis where surety is under investigation by state criminal investigating agencies for misrepresenting its financial condition and where surety has virtually no assets.

DECISION

Dunbar & Sullivan Dredging Co. protests the rejection of its bid for failure to provide an adequate bid guarantee from a responsible surety as required by invitation for bid (IFB) No. DACW62-88-B-0008, issued by the Corps of Engineers, Nashville District, for channel dredging on the lower Cumberland River in Kentucky. Dunbar contends that the letter of credit that it submitted with its bid should have been acceptable to the contracting officer with additional guarantees which it had offered.

We deny the protest.

The IFB, issued on May 18, 1988, required bidders to submit a bid guarantee in the amount of 20 percent of the bid price. The IFB also incorporated Federal Acquisition Regulation § 52.228-1, which requires bid guarantees to be in the form of a "firm commitment," such as an irrevocable letter of credit, and states that a bidder's failure to satisfy this requirement at bid opening may be cause for rejecting the bid.

After bid opening on July 7, the Corps found that the protester had submitted as a bid guarantee an irrevocable letter of credit issued by the Central Pacific Bancorp, Ltd. (CPB) of Mills, Wyoming. The agency subsequently learned, however, that on July 22 the Seventh Judicial District of Wyoming had issued an injunction against CPB engaging in the offer or sale of securities. Furthermore, it appeared that

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the Secretary of State of Wyoming had charged CPB both with a failure to register with the State Securities Commissioner and with making untrue statements of material fact with intent to defraud, in particular by misrepresenting the financial condition of the corporation. The State of California has apparently taken similar action. CPB's assets apparently amount to less than \$20,000, an amount insufficient to cover the bid guarantee.

The protester then offered "to submit to the Corps a guarantee of the letter of credit of [CPB], such guarantee to be issued by good and sufficient sureties acceptable to the Corps." The protester argues that such action would not have constituted the substitution of a surety since "the liability of [CPB] as fixed at the bid opening date [would have] remain[ed]," and since the responsibility of the surety can be established any time prior to contract award. The contracting officer rejected the offer and determined the protester's surety to be nonresponsible both in terms of financing and integrity. This protest followed.

As the protester contends, the question of the financial acceptability of a surety is a matter of responsibility which may be established at any time before contract award. Contract Services Co., Inc., B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263. In making a determination regarding responsibility, however, the contracting officer is vested with a wide degree of discretion and business judgment; absent bad faith or the lack of any reasonable basis for his determination, it is left to the contracting officer to decide what specific financial qualifications to consider in determining responsibility. Nova International, Inc., B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284.

Here, the record contains overwhelming evidence supporting the contracting officer's determination. Specifically, the record shows that: (1) CPB was incorporated in Delaware less than 30 days before issuing a letter of credit to Dunbar; (2) CPB is not authorized to issue securities in Wyoming, the state in which it was doing business; (3) CPB is under investigation for felony security fraud in Wyoming; (4) a district judge in Wyoming has enjoined CPB from issuing letters of credit on the grounds that it was misrepresenting its financial condition and "that the letters were being issued in furtherance of a scheme to defraud;" (5) the Wyoming Banking Commission has determined that CPB has virtually no assets; and (6) an arrest warrant has been issued for the individual who signed the letter of credit submitted by Dunbar. Indeed, the protester admits that "although it was unknown to [Dunbar], [CPB] apparently had no assets and in fact now appears to be a fraudulent

enterprise under criminal investigation in at least two states, California and Wyoming." Based on this information, we have no difficulty in concluding that the record contains more than sufficient evidence upon which the contracting officer could reasonably base his nonresponsibility determination.

Concerning Dunbar's offer of a subsequent guarantee of the letter of credit of CPB, the surety, without altering that firm's initial liability, the record shows that the firm has virtually no assets. Under these circumstances, the government would have to look to the new guarantor of the letter of credit for any and all payment. We think this would be tantamount to the replacement of the initial surety with a new surety, which is not allowed after bid opening. See Clear Thru Maintenance, Inc., B-203608, June 15, 1982, 82-1 CPD ¶ 581. Such a substitution would, in substance, replace the liability of a worthless surety with the liability of a new surety at the post-bid opening discretion of the bidder who could elect to qualify or not qualify for the contract. Accordingly, we agree with the Corps' refusal to permit, in effect, a surety substitution as proposed in this case.

The protest is denied.

for *Seymour Efron*
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General Counsel